

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER: 04-0119**  
**Sales and Use Tax**  
**For Tax Year 2001**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

**ISSUES**

**I.     Sales and Use Tax-Publications**

**Authority:** Ind. Code § 6-2.5-3-2, Ind. Code § 6-2.5-5-17, 45 IAC 2.2-5-26, *Emmis Publishing Corporation v. Indiana Department of Revenue*, 612 N.E.2d 614 (Ind. Tax 1993)

Taxpayer protests the assessment of use tax on its publication.

**STATEMENT OF FACTS**

Taxpayer is a beneficial society organized under § 501(c) (2) of the Internal Revenue Code. Members of this society elect a board of directors to manage the distribution of benefits to each of the members. Each month Taxpayer purchases a publication and distributes it to each of its members. After a routine audit, the Indiana Department of Revenue assessed additional use tax on Taxpayer's use of this publication. Taxpayer protested this assessment. Further facts will be provided as necessary.

**I.     Sales and Use Tax-Publication**

**DISCUSSION**

Ind. Code § 6-2.5-3-2 imposes the gross retail tax on "the storage, use, or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction." Taxpayer purchases a publication and distributes it to its members. This use is generally subject to the gross retail tax. Taxpayer contends, however, that the publication is a newspaper and therefore qualifies for exemption from the gross retail tax pursuant to Ind. Code § 6-2.5-5-17. The auditor for the Indiana Department of Revenue classified the publication as a magazine. Therefore, it would not qualify for the newspaper exemption to the gross retail tax. The issue to be determined is whether the publication is a newspaper qualifying for exemption or a magazine subject to tax.

The Indiana Administrative Code provides clarification of the newspaper exemption at 45 IAC 2.2-5-26 as follows:

- (a) General Rule. In general, sales of all publications irrespective of format are taxable. The exemption provided by this rule is limited to sales of newspapers.
- (b) (b) Application of the general rule. For purposes of [sales] tax, the term “newspaper” means only those publications which are:
  - (1) commonly understood to be newspapers;
  - (2) published for the dissemination of news of importance and of current interest to the general public, general news of the day, and information of current events;
  - (3) circulated among the general public;
  - (4) published at stated short intervals;
  - (5) entered or are qualified to be admitted and entered as second class mail matter at a post office in the county where published; and
  - (6) printed for resale and are sold.
- (c) Publications which are primarily devoted to matters of specialized interest such as business, political, religious, or sporting matters may qualify for exemption if they also satisfy the criteria listed in subsection 26 of this rule [subsection (b)].
- (d) Magazines, periodicals, journals, bulletins, advertising supplements, handbills, circulars, or the like are not newspapers until distributed as a part of a publication which is a newspaper within the meaning of this rule [45 IAC 2.2].
- (1) Magazines are not construed to be newspapers. The retail sales of all magazines and periodicals are subject to sales tax. The sale of magazines by subscription is subject to sales tax without regard to the price of a single copy, and sales tax without regard to the price of a single copy, and sales tax must be collected by the seller from the person who subscribes to the magazine on the full subscription price.
- (2) For purposes of [sales] tax, the term ‘newspaper’ shall include advertising inserts. Advertising inserts shall mean only those publications which are:
  - (A)(i) produced for a person by a private printer and delivered to the newspaper publishers, or
  - (ii) produced and printed by a newspaper publisher, or
  - (iii) produced and printed by a person and delivered to the newspaper publisher, and
  - (B) inserted by the newspaper publisher into the newspapers and distributed along with the newspapers.

Any distribution not meeting the above test does not qualify for the newspaper insert exemption. Examples of items distributed along with a newspaper that do not qualify for the exemption include: gum, shampoo, and detergent samples.
- (e) Publications issued monthly, bimonthly or at longer or irregular intervals are generally not considered to be newspapers.
- (f) Racing forms and tip sheets are not newspapers.

- (g) A preponderance of advertising, lack of authorization to carry legal advertising, or lack of a masthead setting forth the publisher, editor, circulation, and place of publication are characteristics of publications other than newspapers.

The Tax Court of Indiana ruled that the requirement set forth in (b)(2) was unconstitutional in *Emmis Publishing Corporation v. Indiana Department of Revenue*, 612 N.E.2d 614 (Ind. Tax Court, 1993). However, any publication must fulfill the remaining five requirements of subsection b to be considered a newspaper.

The first requirement of subsection (b) is that the publication must be commonly understood to be a newspaper. The fact that there is a dispute over whether this publication is a newspaper or a magazine indicates that it is at least questionable whether the publication would be considered a newspaper. Further the publication is very similar to publications commonly perceived of as magazines which are sent to members of beneficial societies.

Finally, one item of note with respect to the issue of whether the publication at issue is a magazine or newspaper: many other beneficial societies distribute the same publication, with about four pages devoted to the local beneficial society. A routine internet search revealed that at least four similarly situated societies referred to the publication as a magazine, and only two referred to it as a newspaper- and one of those later referred to the publication as a magazine in the same paragraph. This leads to one inference: even the beneficial societies that distribute this publication cannot decide if it is a newspaper, and actually lean in the direction that the publication is not a newspaper. Taxpayer's publication does not meet the test of being commonly understood as a newspaper since there appears to be a great deal of room for discussion about the subject.

Next, to be considered a newspaper, the publication must be circulated among the general public. This publication is automatically mailed each month to all the members of Taxpayer's beneficial society. This is the primary means of circulation. Members of the general public, if they knew of the offer and were interested, could subscribe to the publication. This is not effectively publicized, however, and there is no evidence that very many people actually pay the subscription rate to obtain the publication. The publication does not circulate among the general public.

Publications that are newspapers are published at short intervals. Most newspapers are published daily or weekly. Further in the regulation at (e), the regulation clearly states that "publications issued monthly. . . are not generally considered to be newspapers." This publication is issued monthly. That is too long an interval for it to be considered a newspaper. Rather, monthly publications are generally considered magazines and not entitled to the newspaper exemption from the gross retail tax.

This publication does qualify to be mailed second class.

The final requirement is that the newspaper be "printed for resale and are sold". As discussed earlier, this publication is offered for sale by subscription to persons who are not members of Taxpayer's beneficial society.

Taxpayer's publication does not meet all of the regulatory requirements to be considered a newspaper exempt from the gross retail tax.

**FINDING**

Taxpayer's protest is denied.

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